Employment Standards TRIBUNAL

An appeal

- by -

Victor Golubkov
("Golubkov")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2014A/82

DATE OF DECISION: November 27, 2014

DECISION

SUBMISSIONS

Stephen Portman	on behalf of Victor Golubkov
Teodora Kristof	on behalf of Camobear Ballroom Incorporated
Terry Hughes	on behalf of the Director of Employment Standards

INTRODUCTION

1. Victor Golubkov ("Golubkov") hails from Russia. He is a dance instructor who had over 10 years' experience in his home country when he decided to come to Canada in search of a better life for himself and his family. During the latter party of 2011, and through a former dance partner, he learned that Teodora Kristof ("Kristof"), who was at that time the principal of an Arthur Murray Dance School franchisee, Camobear Ballroom Incorporated ("Camobear"), was seeking a dance instructor. Since Mr. Golubkov was neither a Canadian citizen nor a resident, Camobear was required to obtain a work permit for him under the terms of the federal government's Temporary Foreign Worker Program ("TFWP"). This permit was eventually obtained and Mr. Golubkov commenced his employment with Camobear on August 30, 2012. The terms of the Labour Market Opinion ("LMO") obtained by Camobear under the TFWP, as well as a related employment contract, lie at the heart of this appeal.

2. While still employed by Camobear, Mr. Golubkov filed two separate complaints under section 74 of the *Employment Standards Act* (the "*Act*"). In the first complaint dated September 26, 2013, Mr. Golubkov sought over $10,100 in unpaid regular wages earned during the period from March 26 to September 26, 2013, on the basis that Camobear was not paying wages based on the wage rate it represented that he would receive. In addition, Mr. Golubkov also claimed about $400 as reimbursement for Medical Services Plan ("MSP") premiums he paid: "My Employer also agreed as per my employment contract to pay for MSP coverage but has failed to do so and I make these payments out of pocket". By way of the second complaint, filed March 12, 2014, Mr. Golubkov claimed approximately $10,700 in unpaid wages and vacation pay for the period September 26, 2013, to March 11, 2014.

3. The September 26, 2013, complaint was the subject of a complaint hearing before a delegate of the Director of Employment Standards (the "delegate") on May 6, 2014. On June 6, 2014, the delegate issued a Determination and accompanying "Reasons for the Determination" (the "delegate's reasons"). The delegate dismissed this complaint. Although the delegate referred to the fact that two complaints were filed, his reasons appear to only address the first of the two complaints. That said, based on the delegate's reasons, it would appear that the second complaint, had it been adjudicated, would also have been dismissed. The delegate, in his submission dated August 28, 2014, states:

> This second complaint dealt with the same wage issue as the original complaint. The complainant continued to be employed after the first complaint was filed. The second complaint was filed by the Complainant in order to ensure any wages that might be found owing under the Act would be captured pursuant to Section 80 of the Act.
>
> The second complaint was dealt with in the hearing process and was captured by the June 6, 2014 Determination.

4. Notwithstanding the delegate's comments, above, the Determination specifically states: "With respect to the complaint filed by Victor Golubkov, dated September 26, 2013 I have determined that the *Employment Standards Act* has not been contravened". The Determination, on its face, simply does not address the second March 12, 2014, complaint. The issues raised by that complaint may be moot (and possibly subject to the doctrines of *res judicata* or issue estoppel) in light of the delegate's reasons relating to the September 26, 2013, complaint. Nevertheless, I find that there has never been a formal adjudication of the March 12, 2014, complaint and, accordingly, that complaint is still before the Director awaiting formal adjudication.

5. I understand that Mr. Golubkov resigned his employment shortly after the Determination was issued and is now operating his own dance studio. Camobear, in its submission, asserted that Mr. Golubkov is now violating the terms of the non-competition and non-solicitation covenants contained in his "Professional Instructor Agreement" (discussed in greater detail, below) and causing it substantial monetary loss. However, whether or not Camobear has a valid claim against Mr. Golubkov under that agreement is matter for the civil courts to determine. The Tribunal has no jurisdiction to address that issue.

6. Mr. Golubkov appeals the Determination on the ground that the delegate erred in law (subsection 112(1)(a)) and on the ground that he now has evidence that was not available when the Determination was being made (subsection 112(1)(c)). I am adjudicating this appeal based on the written submissions filed by the parties and, in addition, I have reviewed the subsection 112(5) "record" that was before the delegate when he was making the Determination (181 pages).

BACKGROUND FACTS AND THE DETERMINATION

7. While Mr. Golubkov was still in Russia, he and Ms. Kristof had several communications and on November 14, 2011, Ms. Kristof sent him an e-mail setting out the terms of a proposed employment agreement whereby he would be paid "$400/week" for his first two weeks "and after that you will average about $600/week based on your productivity". This e-mail does not confirm that the parties actually reached an agreement on those terms. I have carefully reviewed the record and there is not a single e-mail or other document that purports to confirm an agreement between the parties as reflected in the November 14, 2011, e-mail prior to Mr. Golubkov's receipt of a proposed formal employment contract following the approval of his work permit by the Canadian federal government. As noted in the delegate's reasons (page R3): "Ms. Kristof and Mr. Golubkov had at least 20 telephone conversations discussing various matters before he moved to Canada to work for Camobear."

8. On February 14, 2012, Ms. Kristof signed an "Application for a Labour Market Opinion (LMO) – Occupations Requiring Post-Secondary Education/Training" relating to Mr. Golubkov's proposed employment as a "ballroom dancing teacher". In the application form, Ms. Kristof indicated that the employment was intended to be "temporary" with an intention to covert the position to "permanent"; the employment duration was fixed at an initial 24-month term; the rate of pay was fixed at $25.56 per hour for an 8-hour per day, 40-hour workweek; the application also indicated under "Other benefits" that the employer would be providing "medical insurance". Ms. Kristof signed the application as the "owner" of the employer after first certifying to the following: "I will provide any temporary foreign worker employed by me with wages, working conditions and employment in an occupation that are substantially the same as those described in the Labour Market Opinion confirmation letter, annex and employment contract"; "I will immediately inform Service Canada/Temporary Foreign Worker Program officers of any subsequent changes related to the temporary foreign workers' terms and conditions of employment, as described in the Labour Market Opinion confirmation letter and annex."; and "I declare that the information provided in this application is true and accurate". The LMO application form also included an attached "Employment Contract" (this appears to be a standard Service Canada form) that was dated February 14, 2012 and signed

by Ms. Kristof but not by Mr. Golubkov (the space for his signature was left blank). This latter document also provided for a 24-month employment term, a 40-hour workweek with a $25.56 hourly wage and a term requiring the Employer "to provide health insurance at no cost to the foreign worker until such time as the worker is eligible for applicable provincial health insurance". The record does not indicate that Ms. Kristof, or any other person on Camobear's behalf, ever notified the federal government that Mr. Golubkov's compensation had changed from that set out in the LMO application and accompanying contract and there was no evidence to that effect before the delegate at the complaint hearing.

9. On March 30, 2012, the TFWP work permit application was formally approved; the application was approved "based on the information in your application, which is outlined in the attached annex". The Annex confirmed a wage rate of $25.56 per hour for a 40-hour workweek plus "10.00 day(s) paid holidays" and "medical insurance". The Annex also noted that the applicant had attested that it would pay the wages set out in the application and would inform Service Canada of any changes in the terms and conditions of employment.

10. Camobear also submitted an application relating to Mr. Golubkov under the British Columbia "Provincial Nominee Program". This application, prepared by Ms. Kristof, indicated that Mr. Golubkov would be provided with "Temporary Accommodation" and "Relocation Costs" and that his annual salary would be $53,164.80 (this is exactly $25.56 per hour based on an 8-hour day/40-hour workweek).

11. On March 31, 2012, Ms. Kristof e-mailed Mr. Golubkov advising that the LMO application had been approved and she asked him to "print out this labor market opinion, attach it to the signed employee contract, job offer letter and other documentation they require from the link I sent you and bring it to the Embassy". It would appear that Mr. Golubkov signed the standard form employment contract at a Canadian Embassy office in Russia on July 9, 2012 (the date is somewhat illegible in my copy of the record but this is the date referred to by Mr. Golubkov's advocate in his submissions to the delegate).

12. Mr. Golubkov was subsequently issued a work permit and he travelled to Canada and commenced his duties as a dance instructor on August 30, 2012. As recounted in the delegate's reasons (at page R5):

> Mr. Golubkov was paid $400 per week for the first two weeks of work. For all subsequent pay periods he has been paid at the rate of $600 per week. The payroll records note the hourly rate of pay as $15.00 per hour and the weekly hours worked as 40 per week.
>
> The Employer provided copies of certain documents that were presented to Mr. Golubkov a few days after he started work. This included the "Professional Instructor Agreement", and "Staff Payscale" document. Mr. Golubkov acknowledged he received and initialled these documents.

13. Mr. Golubkov executed the "Professional Instructor Agreement" on September 5, 2012. This document appears to be a standard form contract of adhesion prepared by the Arthur Murray Dance Studio franchisor, Arthur International, Inc. This agreement is silent with respect to Mr. Golubkov's compensation (and most all other terms and conditions of employment) but does contain non-competition, non-disclosure and non-solicitation covenants each of which is supported by a liquidated damages provision (the agreement also provides for a $5,000 promissory note in favour of the franchisee). The 2-page "Staff Payscale" document does not set out any particular pay rate (other than to indicate that pay will be at least the minimum wage) and mostly deals with administrative issues relating to payroll processing and payment for participating in competitions, shows and "outside of studio" lessons.

14. Mr. Golubkov was still employed as a dance instructor with the studio as of the date of the complaint hearing (May 6, 2014). At the hearing, he testified that while he knew he was not being paid at the rate set out in his

written employment contract he also stated that, at least initially, he was hesitant to raise the matter since he did not wish to jeopardize his status in Canada. Some time later, he did raise the matter of his wage rate with Ms. Kristof who told him that if he wished to earn more than $600 per month he would have to teach more classes.

15. The dance studio was sold as of January 1, 2013, to a Mr. Anthony Thompson ("Thompson"; a former employee of the business). Although not described as such in the delegate's reasons, it would appear that this transaction was a share sale since as of January 1, 2013, Ms. Kristof ceased to be a Camobear director and Mr. Thompson was recorded as the company's sole director. Mr. Thompson was not involved in Mr. Golubkov's initial hiring and testified at the complaint hearing that he was not aware of any issue with respect to Mr. Golubkov's compensation until June 2013 when Mr. Golubkov raised the matter with him.

16. The delegate ultimately dismissed the September 26, 2013, complaint (as previously noted, he did not address the later March 12, 2014, complaint). The delegate concluded, first, that the parties reached an agreement that the wage rate would be about $600 per week ($15 per hour) and that this agreement preceded the $25.56 per hour wage rate set out in the LMO application (page R11). Second, he found that if there was a contravention of federal TFWP rules, "that is a matter for the federal government to determine" (page R11). Third, the delegate determined that the parties never discussed the matter of medical insurance. He found the parties never reached an agreement regarding this issue and that the parties' written employment contract was "ambiguous" since it does not expressly require Camobear to pay for Mr. Golubkov's MSP premiums (page R12). Fourth, having found that the parties agreed to a wage rate that was in fact paid, there was no section 8 misrepresentation but, even if there were, any complaint about a possible section 8 contravention "is out of time under the Act" (page R12).

REASONS FOR APPEAL

17. The appeal is based on two grounds, namely, that the delegate erred in law (subsection 112(1)(a)) and on the "new evidence" ground (subsection 112(1)(c)).

18. The alleged errors of law primarily relate to the delegate's finding of fact regarding the agreed wage rate. Mr. Golubkov submits that the delegate erred in finding that the parties agreed to a wage rate other than that set out in the LMO application and related employment contract ($25.56 per hour). More particularly, he says that the delegate should have applied the Employment Standards Branch's *Interpretation Guidelines Manual* provision dealing with LMOs:

> **Foreign Workers entitled to wage rate in Labour Market Opinion**
>
> In order to hire foreign workers, employers must receive a positive Labour Market Opinion (LMO) from Service Canada. Among other things, the employer must offer prevailing wage rates and acceptable working conditions. The employer must state the proposed wage rate, and the LMO will not be issued if the wage rate is below the prevailing wage rate.
>
> The Director considers the wage rate stated in the LMO to be the one agreed to between the parties, and will enforce that wage rate.
>
> The minimum wage rate established in Part 4 of the Regulation will be the wage rate enforced by the director if:
>
> - no agreement was reached between the parties on a wage rate; or
> - it is impossible to determine what wage rate was agreed to between the parties.

19. Further, Mr. Golubkov says, contrary to the delegate's finding, that the parties actually agreed on the $25.56 per hour wage rate:

> Mr. Golubkov testified in hearing [*sic*] that Ms. Kristof advised him over the phone, following receipt of the employment contract and LMO, that he would be paid $25.56 per hour, as stipulated in his employment contract and LMO. This was subject to a paid an [*sic*] introductory wage rate of $15.00 per hour. As noted in the Determination, this lower wage rate is stipulated in the November email sent to Mr. Golubkov by Ms. Kristof prior to the receipt and signing of the employment contract and LMO. Mr. Golubkov's final decision to accept employment was based on the LMO and the contract provided to him and signed by his ex-employer. (*sic*)

20. Mr. Golubkov also submits that the delegate erred in finding that the terms of the parties' employment contract did not oblige Camobear to pay Mr. Golubkov's MSP premiums.

21. The "new evidence" submitted on Mr. Golubkov's behalf consists of two documents. The first is a 1-page hand-printed letter dated March 15, 2012, on Camobear's letterhead and signed by Ms. Kristof, that states, *inter alia*: "The contract will be for 24 months 40 hours/week. The pay is $25.56/hour". The second document is an undated typed 1-page letter, also on Camobear's letterhead and signed by Ms. Kristof, that is headed "JOB OFFER LETTER" and addressed "To Whom It May Concern". The letter refers to a proposed offer of employment to Mr. Golubkov and the final paragraph reads: "Employment can start immediately after work permit is approved. The contract will be for 24 months, 40 hours/week. The pay is $25.56/hour." Mr. Golubkov concedes that he had these two documents in his possession as of the May 6, 2014, hearing date but that he did not discover them until June 19, 2014 after he received the Determination.

FINDINGS AND ANALYSIS

22. My findings with respect to Mr. Golubkov's actual wage rate may depend on whether the "new evidence" is admissible. Accordingly, I propose to first address this ground of appeal.

New Evidence

23. New evidence is admissible in accordance with the criteria set out in *Davies et al.*, BC EST # D171/03. The evidence must be relevant, credible and have high presumptive probative value (in the sense that, had it been before the delegate, it would likely have affected his or her decision). I am satisfied that, at the very least, the two documents submitted as "new evidence" are relevant and potentially have high probative value given that they relate to a central issue in this appeal – the agreed wage rate. There is no issue about the authenticity of the documents although Camobear says that the documents should not be taken at face value.

24. The more problematic issue about these two documents concerns the first of the four *Davies* criteria, namely, "the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made" (*Davies*, page 3). Mr. Golubkov says that he believed the evidence he submitted to the delegate relating to the LMO – indicating that the wage rate was $25.56 per hour – coupled with the text of the *Interpretation Guidelines Manual* published by the Employment Standards Branch relating to section 16 of the *Act* (which states: "The Director considers the wage rate stated in the LMO to be the one agreed to between the parties, and will enforce that wage rate.") was sufficient to prove his claim as it related to the wage rate. Mr. Golubkov submits that he "could not have reasonably expected" that the text of the *Interpretation Guidelines Manual* "would be given so little weight" and that he "made no further effort prior to the hearing to unearth additional evidence as he believed that he had met the burden of providing the required evidence described in the policy directive".

25. As for when the two additional documents were discovered, Mr. Golubkov says that it was only after he received the Determination that he "searched for further documentation, directly provided by the employer and not a third party agent, to verify that his employer had in fact confirmed the wage rate reflected in the LMO and Employment Contract through personal correspondence in addition to the LMO and employment contract".

26. As previously noted, the hand-printed letter is dated March 15, 2012, and although the second typed document is not dated, it was likely created around the same time period. In fact, Camobear in its submission says that the two documents were prepared at the same time – "The first hand written document is simply a draft of the second typed up one. Therefore they are not two different documents". The text of the two documents is virtually identical.

27. The complaint hearing was conducted on May 6, 2014. Prior to the hearing, the parties received a "Notice of Complaint Hearing" dated March 6, 2014, indicating where and when the hearing would be conducted. The Notice stated that certain listed documents had already been filed and did not have to be resubmitted but also directed the parties to "Send the Branch two hard copies or one electronic copy of any documents you intend to rely on by **4:30 PM Friday, April 4, 2014** …" (**boldface** in original text) and to provide a list of their additional documents using an attached form. The Notice also stated: "It is your responsibility to ensure that any records or evidence you intend to rely on at the hearing are submitted to the Branch by **4:30 PM Friday, April 4, 2014**) so the Branch has time to send them to the other party for their review prior to the hearing." (**boldface** in original text). It is my understanding that, along with the Notice, the parties received a "Factsheet" headed "Adjudication Hearings". This latter document also emphasized the need for parties to ensure prehearing disclosure of their documents:

> **Preparing for an adjudication hearing**
>
> Before the adjudication hearing, the parties must
>
> - Send the Branch two copies of any documents they intend to rely on in enough time for these documents to be provided to the other party; …
>
> **What to expect at the Hearing**
>
> …
>
> All documents to be used at the hearing must be provided in advance. The Adjudicator may refuse to consider any documents introduced for the first time at the hearing, or may grant the other party an adjournment to review the new documents and prepare a response. …

28. I note that Mr. Golubkov was represented at the complaint hearing and he should have presented all of his evidence relevant to his complaint at the hearing. He certainly had ample warning that all documents relevant to his case were to be submitted to the delegate at the complaint hearing. The appeal process is not intended to serve as a second opportunity for parties to present the case they could have, and should have, presented at the complaint hearing. I do not find Mr. Golubkov's argument regarding the effect of the *Interpretation Guidelines Manual* to be particularly persuasive – this manual is, as the name suggests, a "guideline" and cannot supersede the *Act*. Indeed, the manual contains the following notice to this effect: "Note: This manual is not a legal document and is meant to serve as a guideline only. It should not be used as a substitute for professional legal counsel."

29. The evidence now submitted on appeal clearly was "available" at the time of the complaint hearing and accordingly is inadmissible under subsection 112(1)(c) of the *Act*. However, that does not necessarily end the issue. On March 6, 2014, a delegate (not the delegate who issued the Determination) issued a "Demand for Employer Records" to Camobear requiring that certain records be produced by no later than 4:30 PM on

Friday, April 4, 2014. The Demand referred, *inter alia*, to "Any and all e-mail/mail correspondence prior to Victor Golubkov's start date of August 2012 regarding offer of Employment and rate of pay". The new evidence submitted on appeal consists, as noted above, of two essentially identical letters (one hand-printed and the other typed) and fall explicitly within the class of documents sought by way of the Demand. The letter is headed "JOB OFFER LETTER" and states that Mr. Golubkov's employment will "start immediately after work permit is approved". The letter continues: "The contract will be for 24 months, 40 hours/week. The pay is $25.56/hour". Camobear, in its submission, does not provide any explanation regarding why it failed to disclose these documents pursuant to the Demand but, at the same time, concedes that they "are not new documents". I am deeply troubled by the fact that Camobear apparently failed to disclose critical documents that were in its possession and that are, on their face, adverse to its position. Mr. Golubkov should have brought these documents to the complaint hearing but that does not excuse Camobear's failure to produce the documents to the Director of Employment Standards in accordance with the Demand (in which case they would have been part of the record before the delegate at the complaint hearing).

Alleged Errors of Law – The Wage Rate

30. Mr. Golubkov submits, firstly, that the delegate "misapplied" the policy, set out above, in the *Interpretation Guidelines Manual* and, from that assertion, submits:

> This policy directive provides a strong presumption that the wage is as set out in the LMO. Overcoming this presumption requires a significant amount of evidence to substantiate a reasonable determination that the wage rate is indeed different. The Delegate provides insufficient grounds to find an agreed upon wage rate outside of the LMO.
>
> …
>
> The Delegate's misapplication of the policy directive, based on a consideration of what the employer stated the wage was rather than starting from the presumption that the LMO contained the agreed upon wage, is an error in law because it is inconsistent with the purposes of the *Act*. The Delegate's decision has had the unlawful result of allowing an employer to contract with an employee to pay a higher wage rate and then in effect pay a substantially lower wage rate.

31. Secondly, and apart from the delegate's failure to give full effect to the *Interpretation Guidelines Manual*, Mr. Golubkov says that the delegate's finding of fact that the parties agreed to a $15 per hour wage rate (rather than the $25.56 per hour rate set out in the LMO) constitutes an error of law by the delegate because it was predicated on "a misapprehension of the evidence" particularly insofar as the delegate preferred Ms. Kristof's evidence over Mr. Golubkov's testimony on this issue.

32. In my view, the delegate did not err in failing to fix the wage rate solely because that was the rate set out in the LMO. Mr. Golubkov submits that the *Interpretation Guidelines Manual* dictates this result but, first, it does no such thing – the guideline specifically states that it "is not a legal document" and "is meant to serve as a guideline only". Second, under the *Act*, the determination of the wage rate in a contract of employment requires the factfinder (in this case, the delegate) to consider all the relevant evidence and to come to a reasoned conclusion, not to slavishly adhere to a non-binding policy manual. The Tribunal has held in several cases that the *Interpretation Guidelines Manual* does not, and legally cannot, supersede the *Act* (see e.g., *Allstar Dental Laboratories Ltd.*, BC EST # D057/98; *O'Rourke*, BC EST # D089/02, reconsideration refused: BC EST # RD273/02); *Rock'N Meeers Holdings Ltd. and Rock*, BC EST # D297/03).

33. Turning to the evidence before the delegate regarding the wage rate, unfortunately, there is a dispute about the substance of Mr. Golubkov's testimony at the complaint hearing. Mr. Golubkov asserts that after he received the LMO and employment contract (while he was still in Russia) he had a telephone conversation

with Ms. Kristof in which she confirmed that his wage rate would be that as stipulated in the two documents, namely, $25.56 per hour but that he would only receive $15 per hour at the outset of his employment – he said Ms. Kristof referred to this latter rate as "an introductory wage". Mr. Golubkov apparently did not testify as to how long this "introductory period" might last. In any event, Ms. Kristof apparently testified at the hearing that she and Mr. Golubkov "never discussed a wage rate of $25.56 per hour" and that they "verbally agreed" to a $15 per hour wage rate (delegate's reasons, page R6). I find Ms. Kristof's assertion that the parties never discussed the $25.56 per hour rate hard to accept given that, surely, Mr. Golubkov would have questioned why he would not be paid at the rate fixed by both the LMO and the draft employment contract – a contact that he was being asked to sign and return.

34. The delegate, at page R5 of his reasons, stated that Mr. Golubkov testified that he had a "Skype conversation" with Ms. Kristof "before he moved to Canada" during which they discussed the $25.56 hourly wage rate set out in the LMO and contract and that when Mr. Golubkov questioned Ms. Kristof "Is this my real wage", she replied saying that he would be paid $15 per hour "but if I work hard enough, I would get more than that" (which he assumed to be $25.56 per hour).

35. Thus, Mr. Golubkov says that he and Ms. Kristof specifically discussed the higher wage rate and he understood that he would be paid at that rate subject only to being paid $15 per hour for an undefined "introductory period". Ms. Kristof, on the other hand, apparently testified that the two of them "never discussed a wage rate of $25.56 per hour". The delegate, at page R11 of his reasons, apparently rejected Ms. Kristof's testimony because he found that she and Mr. Golubkov *did* discuss a $25.56 per hour wage rate after Mr. Golubkov received the LMO and employment contract. The delegate then concluded that the parties reached an agreement for a $15 per hour wage for a 40-hour workweek. Perhaps adding further confusion to the whole issue, Ms. Kristof apparently testified that dance instructors could earn between $23.58 and $26.25 per hour but only on a "flex-time" basis which means that the instructor would only be paid for actual classes taught with no guaranteed minimum weekly salary (delegate's reasons, page R7) and the delegate concluded that Mr. Golubkov was not hired on a flex-time arrangement (page R11).

36. Mr. Golubkov says that the delegate inaccurately summarized his evidence. I do not have a transcript before me that would assist me in sorting out what was actually said at the hearing. The delegate seemingly found Ms. Kristof not to be credible on the question of whether the parties ever discussed the $25.56 per hour wage rate during that fateful Skype conversation, but also rejected Mr. Golubkov's evidence and accepted Ms. Kristof's position that the parties actually agreed to a $15 per hour wage rate. The delegate did not undertake any sort of formal credibility assessment of these two principals whose evidence was almost diametrically opposed.

37. There clearly were conversations pre-dating the LMO and formal employment contract being sent to Mr. Golubkov. Ultimately, though, there were only two written employment contracts. The first, signed by Ms. Kristof on February 14, 2012, and Mr. Golubkov on July 9, 2012 (Mr. Golubkov commenced his employment on August 30, 2012), very clearly states that Mr. Golubkov will be paid $25.56 per hour for a 40-hour workweek (paragraphs 4 and 9). It is a formal written agreement signed by both parties and it unambiguously sets out Mr. Golubkov's terms and conditions of employment including his compensation. The second written employment contact between the parties, described as a "Professional Instructor Agreement", is dated and appears to have been signed by both parties on September 5, 2012 (about two weeks after Mr. Golubkov commenced his employment). This rather one-sided and onerous agreement (from the employee's point of view) commits Mr. Golubkov to work for Camobear for a period of two years; it gives the employer the unilateral right to terminate with the employer's decision being "final and binding"; it contains separate 2-year non-solicitation and non-competition covenants with significant liquidated damages provisions extending up to $25,000 per contravention. But the only mention of compensation is

found in paragraph 7 which states that Mr. Golubkov shall be paid "not less than the minimum by any federal, state or local minimum wage law applicable to such employee".

38. In light of the clear and unambiguous employment agreement fixing the contracted wage, any evidence that Camobear wished to introduce about some other wage rate was parol evidence and, as such, was presumptively inadmissible under the parol evidence rule (see *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53). The delegate does not even acknowledge the rule let alone address it in his reasons. Mr. Golubkov says that he agreed to a wage rate consistent with the parties' written agreement. That wage rate was included in an application for an LMO and was embedded in the LMO confirmation (both of which were prepared by Camobear). Ms. Kristof signed the LMO application on February 14, 2012 declaring, in so doing, that she had read the application and "that the information provided in this application is true and accurate". The $25.56 per hour wage rate was also the wage rate set out in Camobear's application to the B.C. provincial government under the Provincial Nominee Program. Finally, it was the wage rate set out in Camobear's correspondence about Mr. Golubkov's wage rate (that it failed to disclose despite the Demand for records).

39. Ms. Kristof attempted to skirt the impact of this wholly consistent and rather compelling body of evidence about the wage rate by suggesting that she, in fact, took no responsibility for the LMO and related documents. She testified that the whole adventure was a "mistake" and foisted the blame onto the shoulders of an unidentified "consultant" who assisted her. However, this consultant did not testify at the hearing; the delegate should have closely scrutinized this evidence given that the one party who could confirm Ms. Kristof's story was not called as a witness – drawing an adverse inference against Camobear, in the circumstances, would not have been inappropriate (see *R. v. Jolivet*, [2000] 1 S.C.R. 751).

40. In light of all of the foregoing concerns, I am satisfied that the delegate's finding on the wage rate issue is sufficiently tainted by error such that it cannot stand. I am in no position to decide the wage rate issue based solely on the record before me (which does not include a transcript of the complaint hearing) and, especially, since I have not seen and heard the witnesses. The only way to deal with this appeal, in my view, is to refer the entire matter back to the Director for a new hearing.

Alleged Error of Law – the MSP Premiums

41. Given that I am referring this matter back to the Director for rehearing, I think it best not to deal with this issue as it will undoubtedly be argued afresh in the rehearing.

42. While, in my view, the preferable course would be for the delegate who presided at the complaint hearing not rehear the matter (given that he apparently made an adverse credibility finding against Mr. Golubkov and thus there could possibly be a natural justice issue if he were to rehear the matter), I am not making such a direction in my formal order. I will leave the assignment of an adjudicator to rehear the matter to the Director's discretion.

ORDER

43. Pursuant to subsection 115(1)(a) of the *Act*, the Determination is cancelled. Pursuant to subsection 115(1)(b) of the *Act*, both of Mr. Golubkov's complaints, filed on September 26, 2013, and March 12, 2014, respectively, are referred back to the Director for rehearing.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal